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JUN 29 1983
ALEXANDER L. STEVAS
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CASE NO. 82-1927

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF FLORIDA,

Petitioner,

v.

VON DEE GRAGG,

Respondent.

On Writ of Certiorari to the
Supreme Court of the
State of Florida

RESPONSE TO JURISDICTIONAL STATEMENT FOR PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

SINCE JEFFERS V. UNITED STATES, 432 U.S. 137 (1977) IS A PLURALITY DECISION OF THIS COURT, THERE CAN BE NO DECISION BY ANY COURT, INCLUDING THIS ONE, THAT CONFLICTS WITH JEFFERS.

II

THE SUPREME COURT OF THE STATE OF FLORIDA HAS RAISED A FEDERAL QUESTION, AND THIS COURT MUST NOW DECIDE WHETHER THE QUESTION IS SUBSTANTIAL ENOUGH TO WARRANT REVIEW BY THIS COURT.

III

ALL THREE LEVELS OF THE FLORIDA COURTS HAVE PROPERLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL AND HAVE CREATED NO CONFLICT WITH ANY FEDERAL DECISION REGARDING THE SAME.

TABLE OF CONTENTS

	Page No.
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii-iv
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	7
SUMMARY OF ARGUMENT	12
ARGUMENT	14
CONCLUSION	27

TABLE OF AUTHORITIES

	Page No.
STATUTES:	
28 U.S.C. §1257(3)	2,18
CASES:	
Adams v. Illinois, 405 U.S. 278 (1972)	15
Apodaca v. Oregon, 406 U.S. 404 (1972)	15
Ashe v. Swenson, 397 U.S. 436 (1970)	17,20, 22,24 25
Atchison, T. & S. F. R. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973)	16
Cuyahoga River Power Co. v. Northern Traction & Light Co., 252 U.S. 388 (1920)	18
Equitable Life Assurrance Society v. Brown, 187 U.S. 308 (1902)	18
Etting v. President, Directors & Co. of Bank, 24 U.S. 59 (1826)	16
Gosa v. Mayden, 413 U.S. 665 (1973)	16

Jeffers v. United States, 432 U.S. 137 (1977) 12,14, 15,16

Laird v. Tatum, 409 U.S. 824 (1972) 16

Mills v. Brown, 41 U.S. 525 (1842) 19

New York ex rel Bryant v. Zimmerman, 278 U.S. 63 (1928) 19

Palmer Oil Corp. v. Amerada Petroleum Corp, 343 U.S. 390 (1952) 18

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) 18

Sealfon v. United States, 332 U.S. 575, 579, 68 S.Ct. 237, 240 24

U.S. v. Jorn, 400 U.S. 470 (1971) 15

United States v. Caucci, 635 F.2d 441 (5th Cir. 1981) 20

United States v. Mock, 604 F.2d 341 (5th Cir. 1979) 19

United States v. Larkin, 605 F.2d 1360, 1363 (5th Cir. 1979) .. 13,18, 20,22

Zucht v. King, 260 U.S. 174 (1922) 18

ABBREVIATIONS:

"T" = Transcript of trial held October 2, 3, and 6, 1980.

OPINIONS BELOW

Respondent is satisfied with their presentation by Petitioner.

STATEMENT OF THE CASE

This case is before this Court on the Petition for Writ of Certiorari filed by STATE OF FLORIDA seeking to have this Court review the opinion of the Supreme Court of the State of Florida upholding the trial court's application of the doctrine of collateral estoppel which resulted in a dismissal of one count of a multi-count Information. Petitioner's basis for this Court's jurisdiction to entertain the Petition for Writ of Certiorari is federal question review pursuant to 28 U.S.C. §1257(3).

Respondent was charged in a three-count Information with aggravated battery (Count I), possession of a firearm by a convicted felon (Count II), and aggravated assault (Count III). Prior to trial, Respondent obtained a severance of

Count II from the other Counts, and the case proceeded to trial at the STATE'S election on Counts I and III. The jury returned verdicts of guilty of the lesser included offenses of simple assault and simple battery.

Subsequently, Respondent moved to dismiss Count II of the Information on the basis of collateral estoppel asserting that the jury, in the trial of Counts I and III, determined that Respondent was not in possession of a firearm at the time alleged in Count II, and that therefore the STATE, because of the application of the doctrine of collateral estoppel, could not prove an essential element of Count II, to wit: That Respondent was in possession of a firearm on the date and at the time alleged. The trial court granted Respondent's Motion

to Dismiss based upon the application of the doctrine of collateral estoppel.

On the first appellate review of this case, the Fourth District Court of Appeal of Florida determined that the jury considered, and rejected, Respondent's possession of a gun, and that, without more, collateral estoppel would bar Respondent's prosecution on Count II. However, the Fourth District Court of Appeal determined that Respondent had, by his own actions, necessitated the two separate, prospective trials, and that he, therefore, was estopped to assert the doctrine of collateral estoppel. The Fourth District Court of Appeal certified to the Supreme Court of the State of Florida the following question:

> "When a defendant successfully seeks severance for trial of one of several counts against him, will he be estopped later to assert collateral estoppel

> as a bar to prosecution on that count where it otherwise would be available."

On review by the Supreme Court of the State of Florida based upon the question certified to it by the lower appellate court to be one of great public importance, the Supreme Court of the State of Florida determined that the District Court of Appeal's decision would result in requiring Respondent to waive one Constitutional right in order to assert another. That court reasoned that it would be unfair to encumber or restrict the exercise of his Constitutional right to a fair trial by requiring him to waive his right of collateral estoppel engrafted upon the double jeopardy provision of the Fifth Amendment to the Constitution of the United States. Accordingly, the Supreme Court of the State of Florida quashed the lower

appellate court's decision and remanded the case with instructions that the trial judge's Order of Dismissal be reinstated.

STATEMENT OF THE FACTS

The events on May 5, 1980, which resulted in charges being filed against the Respondent, began with a domestic dispute between Joe Harrison, and a woman named Mary Smith. At the trial on Counts I and III of the Information, Harrison testified he had been living with Mary Smith for about six months and on May 5, 1980, he had decided to move out of her house. (T-131, 133.) Before leaving, he got into an argument with Mary and a friend of hers, Debbie Woody (T-138, 142), and struck Debbie Woody knocking her from a kitchen stool. (T-294.) As a result, Debbie Woody called the police (T-296), and the Respondent (T-296). The police remained at Mary Smith's residence until Joe Harrison left. (T-143.) Mr. Harrison returned to the residence to

pick up his personal belongings. He had arranged to have his girlfriend, Margaret Raines, meet him at his new residence, ride with him to his car to a rootbeer stand, and wait for his return there while he rode with the police to Mary Smith's house. (T-144.)

When he arrived at his new residence, Mr. Harrison realized that he did not have his key, so he went next door to let his neighbors know that he would be breaking into the house through a side window. (T-221.) His neighbors advised him that they had a key and that if he would wait they would get it. (T-221.) While waiting at the neighbor's house, Mr. Harrison testified that he heard someone call his name, he turned, and the Respondent was standing behind him with his arm raised in the air with a gun in it, bringing it downwards to strike Mr.

Harrison. (T-146.) The neighbor testified that he had turned to go into the house when Mr. Harrison turned to go back to his house, and he saw no one standing behind Mr. Harrison. (T-222.)

Respondent denied approaching Mr. Harrison in such a fashion, denied striking him with any weapon or any object other than his fists which were adorned with rings, and testified that his striking Mr. Harrison was in self-defense. (T-326, 320-330.) The physician who treated Mr. Harrison testified his injuries were consistent with being hit with a blunt object, which could have been the rings that Respondent wore during the fight or a pistol. (T-70, 78.)

The only testimony in the trial that Mr. Gragg was in possession of a firearm on May 5, 1980, came from Mr. Harrrison

who testified he saw the gun for the first time as Mr. Gragg was about to hit him with it, and for the last time when the first skirmish was over. (T-146-150.)

Mary Smith traveled with Mr. Gragg to Mr. Harrison's new residence, was with Mr. Gragg throughout the stay at Mr. Harrison's residence, and returned to Mary Smith's house with Mr. Gragg. (T-262-273.) She testified that she did not see a weapon in his possession at all throughout the night. (T-263.) The other witnesses who were at the scene testified that they did not see a gun in Mr. Gragg's possession. (T. 117, 212-213, 228.)

When the Respondent was arrested, he was in his car with Mary Smith the day following the above described incident. (T-97-87, 101.) There was no gun in the

car. (T-101.) There was a gun cleaning kit owned by Respondent's wife in the car, with conflicting evidence as to whether or not it was in the front seat, back seat or on the floor. (T-100.) The Respondent voluntarily explained to the police why the gun cleaning kit was in the car, explaining that his wife owned two guns (T-367) and the kit was probably left in the car from when his wife had gone to the shooting range. (T-337.)

Beyond the initial search of Respondent's automobile at the time and place of his arrest, the STATE never attempted to find the gun allegedly possessed and used by Respondent and, accordingly, presented no such weapon at the trial.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of the State of Florida does not conflict with Jeffers v. United States, 432 U.S. 137 (1977) since Jeffers is a plurality decision thereby establishing no principle of law. The question passed upon by the Supreme Court of the State of Florida involves a federal question, to wit: Whether or not a defendant in a criminal case must waive his right to apply the doctrine of collateral estoppel (which has been characterized as being "engrafted upon" the Fifth Amendment protection against double jeopardy) in order to assert his Fourth Amendment right to a fair trial. Respondent recognizes this question to be one of significance, but additionally recognizes that he cannot vest this Court with

jurisdiction by conceding that this Court should review the principle of law established by the decision of the Supreme Court of the State of Florida.

Respondent asserts that there is ample federal law to guide the appropriate courts in the application of the doctrine of collateral estoppel in criminal cases and, since this Court has previously declined to review one such case that is generally recognized that is being precedential and authoritative (United States v. Larkin, 605 F.2d 1360, 1363 (5th Cir. 1979)), this Court should likewise decline to review this case.

Finally, Respondent asserts that all three levels of the state courts that have decided this case have correctly applied the doctrine of collateral estoppel.

ARGUMENT

I

SINCE JEFFERS V. UNITED STATES, 432 U.S. 137 (1977) IS A PLURALITY DECISION OF THIS COURT, THERE CAN BE NO DECISION BY ANY COURT, INCLUDING THIS ONE, THAT CONFLICTS WITH JEFFERS.

The first reason presented by the Petitioner for granting the Writ of Certiorari is that the decision of the Supreme Court of the State of Florida is in conflict with this Court's decision in Jeffers v. United States, 432 U.S. 137 (1977).[1] (Petition, p. 11.)

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[1] While the first question presented for review in the Petition for Writ of Certiorari contained on page i of the Petition is directly contradicted by point I as phrased by Petitioner on page 11 of the Petition, Respondent answers the Petition under the assumption that there is an error in the phraseology of point I on page 11. The error appears to Respondent to be in the use of the word "applicable" as opposed to "inapplicable".

Jeffers is a plurality decision. Justice Blackmun announced the judgment of the Court and an opinion in which the Chief Justice, Justice Powell and Justice Rehnquist, joined. Justice White concurred in the judgment in part and dissented in part. Justice Stevens, with whom Justice Brennan, Justice Stewart and Justice Marshall joined, dissented in part and concurred in the judgment in part. (See also Justice White's concurrence and dissent in which he described the opinion as a plurality opinion.) Ibid, p. 158.

This Court will affirm a decision if a majority of the Justices vote in favor of affirmance, even though no one opinion commands the concurrence of a majority of the Justices. U. S. v. Jorn, 400 U.S. 470 (1971); Adams v. Illinois, 405 U.S. 278 (1972); Apodaca v. Oregon, 406 U.S.

404 (1972); Atchison, T. & S. F. R. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973); Gosa v. Mayden, 413 U.S. 665 (1973). In such a case, no principle of law is settled by the affirmance. Etting v. President, Directors & Co. of Bank, 24 U.S. 59 (1826); Laird v. Tatum, 409 U.S. 824 (1972).

It is axiomatic that Jeffers must contain a settled principle of law for any case to be in conflict with it. Since it does not, by virtue of it being a plurality decision, no case can conflict with it.

Respondent takes exception to Petitioner's statement that the Supreme Court of the State of Florida "recogniz[ed] that Jeffers was on point, . . ." (Petition, p. 14.) Nowhere in its decision does the Supreme Court of the State of Florida recognize Jeffers as

being on point with the issues presented.

The STATE OF FLORIDA offers no other case with which the decision of the Supreme Court of the State of Florida conflicts. Apparently, the STATE OF FLORIDA relies solely upon Jeffers as its basis for "conflict jurisdiction". Accordingly, there being no conflict with a decision of this Court, certiorari should not be granted.

II

THE SUPREME COURT OF THE STATE OF FLORIDA HAS RAISED A FEDERAL QUESTION, AND THIS COURT MUST NOW DECIDE WHETHER THE QUESTION IS SUBSTANTIAL ENOUGH TO WARRANT REVIEW BY THIS COURT.

Since the principle of collateral estoppel is "engrafted upon" the double jeopardy clause of the Fifth Amendment, this case certainly involved a federal question. Ashe v. Swenson, 397 U.S. 436

(1970); United States v. Larkin, 605 F.2d 1360, 1363 (5th Cir. 1979).

In order to sustain Supreme Court jurisdiction under 28 U.S.C. §1257(3) to review a state court decision, a federal question may not be one of mere form. Cuyahoga River Power Co. v. Northern Traction & Light Co., 252 U.S. 388 (1920). The question must be real and substantial. Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902); Zucht v. King, 260 U.S. 174 (1922); Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952).

A party seeking review in the Supreme Court bears the burden of affirmatively establishing the court's jurisdiction, and any doubts as to the existence of that jurisdiction are to be resolved against that party. Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62

(1948). The jurisdiction of the Supreme Court cannot be established by the consent or acquiescence of the parties. Mills v. Brown, 41 U.S. 525 (1842); New York ex rel Bryant v. Zimmerman, 278 U.S. 63 (1928).

While Respondent recognizes that the question of waiving one Constitutional right by asserting another is an extremely important question in criminal law, Respondent does not have the power to concede jurisdiction.

However, in its Petition for Writ of Certiorari, and particularly in point II therein, the STATE OF FLORIDA continues to ignore the distinction between double jeopardy and collateral estoppel. Although double jeopardy necessarily includes collateral estoppel, collateral estoppel does not equate with or include double jeopardy. United States v. Mock,

604 F.2d 341 (5th Cir. 1979); United States v. Caucci, 635 F.2d 441 (5th Cir. 1981). Collateral estoppel involves the establishment of a fact once and for all, while double deopardy deals with a procedural bar to a second trial. Ashe v. Swenson, 397 U.S. 436 (1970); United States v. Larkin, 605 F.2d 1360 (5th Cir. 1979).

Yet, all of the arguments offered by the STATE OF FLORIDA to carry the STATE'S burden of affirmatively establishing this Court's jurisdiction are founded upon double jeopardy arguments and not that of collateral estoppel.

The STATE argues that it has been "penalized" (brief, p. 18) by a defendant who has obtained a severance to preserve his Constitutional right to a fair trial on two of the three counts against him, and who has submitted to the jury for its

determination whether or not the defendant used, and therefore possessed, a firearm. Respondent respectfully suggests that there is no penalty involved in the STATE, having had an opportunity to prove an ultimate fact, being forced to live with a jury's determination of that fact. In this case, the jury determined that Respondent did not use, and therefore did not possess, a firearm. The STATE seeks to have a second bite of the apple to try to convince a different jury what it could not prove to the first jury. The doctrine of collateral estoppel arose to prevent that second bite of the apple and to give significant meaning to jury decisions.

There presently exists sufficient federal law on the application of the doctrine of collateral estoppel that the state and federal forums can be guided in

its application. See Ashe v. Swenson, 397 U.S. 436 (1970); United States v. Larkin, 605 F.2d 1360 (5th Cir. 1979) modified 611 F.2d 585 (5th Cir. 1980), U.S. cert. den., 446 U.S. 939.

Since it appears as though this Court has once before rejected the opportunity to review the application of the doctrine of collateral estoppel in a somewhat similar factual situation, it would seem inconsistent for this Court to grant certiorari to review this case. United States v. Larkin, supra.

III

ALL THREE LEVELS OF THE FLORIDA COURTS HAVE PROPERLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL AND HAVE CREATED NO CONFLICT WITH ANY FEDERAL DECISION REGARDING THE SAME.

The STATE refuses to accept the fact that possession of a firearm by Respondent (an ultimate fact) was determined against the STATE by the jury in the

first trial. The trial court has so held in its Order of Dismissal. The Fourth District Court of Appeal has so held (A-23 through A-29), and the Supreme Court of the State of Florida has so held (A-7 through A-10.) All have done so because in the unique factual situation of this case, a rational jury cannot separate the possession of a firearm from the use of the firearm based upon the evidence presented to said jury. Since the jury necessarily decided that Respondent did not use the firearm, (thus its verdict of guilty of the lesser included offenses of simple assault and simple battery), and since it cannot separate use from possession, the jury necessarily decided that Respondent did not possess a firearm.

All three levels of the state court passing upon this question have applied

the Doctrine of Collateral Estoppel pursuant to this Court's statement in Ashe v. Swenson, 397 U.S. 436, 444 (1970);

> "Where a previous judgment of acquittal was based upon a general verdict as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of their proceedings.'" Sealfon v. United States, 332 U.S. 575, 579, 68 S.Ct. 237, 240.

In fact, most of the written opinion from the Fourth District Court of Appeal was its examination of the trial record regarding the issue of use and therefore possession of a firearm. (A-22 through A-29). After this thorough examination,

the Fourth District Court of Appeal concluded that:

> "It seems to us by necessary implication that the jury considered, and rejected, appellee's possession of a gun. This is so because a rational jury, on these facts, could not have separated the two issues." (A-29.)

The STATE again argued the distinction between possession and use to the Supreme Court of the State of Florida. That court similarly conducted a thorough review of the record and determined that:

> "The district court of appeal correctly concluded that the jury actually decided that Gragg did not have a gun. . . . Since there was no evidence other than the victim's testimony, that Gragg possessed a pistol that night, the jury must have actually decided that Gragg did not have a pistol." (A-7 through A-8.)

Just as in Ashe v. Swenson, 397 U.S. 436 (1970), where an ultimate fact (i.e.

identity) was conclusively determined against the State in the first trial, and therefore the State could not prosecute the same defendant in a second trial arising out of the same circumstances, in this case an ultimate fact (i.e. possession of a firearm) has been determined against the STATE and, since possession of a firearm is an essential element of the only remaining count against Respondent, that count was properly dismissed against Respondent. The STATE could not gain a successful conviction where it could not prove one of the essential elements of the crime charged.

It would be fruitless, a waste of judicial time and public funds to, as the STATE suggests in its brief, require a trial to determine whether Respondent is entitled to invoke collateral estoppel.

The doctrine, itself, precludes such a tail-chasing act.

CONCLUSION

Based upon the foregoing, Respondent requests that the Petition for a Writ of Certiorari filed by the STATE OF FLORIDA be denied.

Respectfully submitted,

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SUPREME COURT OF FLORIDA

No. 61,854

VON DEE GRAGG, Petitioner,

vs.

STATE OF FLORIDA, Respondent

[April 7, 1983]

BOYD, J.

This case is before us to review a decision of a district court of appeal, State v. Gragg, 409 So.2d 1127 (Fla. 4th DCA 1982), which passed upon a question certified to be of great public importance. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

Appellant Von Dee Gragg was charged in a three-count information with (1) aggravated assault by use of a firearm;

(2) possession of a firearm by a convicted felon; and (3) aggravated assault by use of a firearm. Before trial Gragg moved for and obtained a severance of the count charging him with possession of a firearm by a convicted felon. The case proceeded to a jury trial on the two remaining counts. At the trial the victim testified that Gragg at first beat him with a pistol and then later beat him with his fists. Gragg admitted to hitting the victim with his fists, but denied having possessed a pistol on the night in question. None of the other witnesses who were at the scene saw a pistol.

During its deliberations the jury asked: "[D]oes the [d]efendant have to have a gun to be guilty of the information charge of aggravated assault, also aggravated battery?" Because the information charged aggravated battery and aggravated assault with a deadly weapon, a firearm, the trial court instructed the jury that it would have to find that defendant used such a weapon. The jury found Gragg guilty of the lesser included offenses of simple battery and simple assault.

After trial the trial court granted the defense motion to dismiss the remaining count--charging possession of a

firearm--on the ground of collateral estoppel. The state appealed this decision to the district court of appeal, arguing that the doctrine of collateral estoppel did not apply. The district court of appeal held that collateral estoppel did apply since the jury must have necessarily decided that at the time of the crimes Gragg did not possess a firearm. However, the district court of appeal concluded that although collateral estoppel would normally bar further prosecution for possession, Gragg was estopped from asserting this defense by his having moved to sever the count charging possession. The court then

certified as a question of great public importance:

> When a defendant successfully seeks severance for trial of one of several counts gainst him, will he be estopped later to assert collateral estoppel as a bar to prosecution on that count where it otherwise would be available [?]

409 So.2d at 1130.

Before we decide this issue we must first address a question raised by the state pertaining to the applicability of the doctrine of collateral estoppel. The state contends that collateral estoppel should not act as a bar to further prosecution because simple possession of a gun was not at issue in the first trial and because the jury may have returned verdicts on the lesser charges out of

compassion, compromise, or exercise of their pardon power. It is true that on its face the jury's verdict did not specifically decide whether Gragg had possessed a gun. However, the United States Supreme Court has stated that

> the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Ashe v. Swenson, 397 U.S. 436, 444 (1970)

(footnote omitted) (quoting Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 38-39 (1960)). Therefore, the test to determine whether collateral estoppel acts as a bar to further prosecution is not whether the factual issue in question was inherently decided by the jury's prior verdict, but rather whether such factual issue was actually decided by the jury in reaching its verdict.

The district court of appeal correctly concluded that the jury actually decided that Gragg did not have a gun. The only evidence of Gragg's having possessed a pistol was the victim's testimony that

Gragg used a pistol to hit him. Since the jury, by finding Gragg guilty of the lesser included offenses of simple assault and battery, acquitted Gragg of aggravated assault and battery, it must have concluded that Gragg did not hit the victim with a pistol. Since there was no evidence other than the victim's testimony, that Gragg possessed a pistol that night, the jury must have actually decided that Gragg did not have a pistol.

In response to the state's argument that the jury's verdict could have been a result of compassion or compromise, the district court of appeal found no evidence that the jury exercised its pardon power. The state argues that there was evidence

which may have caused the jury to act leniently. The state points out ther Gragg testified that the victim had struck and kicked at him first and that later he was very sorry for having hit the victim. There was also evidence that Gragg confronted the victim because the victim had struck a woman friend of Gragg's earlier in the evening. Hence there does seem to be some evidence to support the view that the jury exercised its pardon power.

However, we do not find such evidence relevant to the question of whether collateral estoppel should apply. Collateral estoppel does not depend on whether

Pages misnumbered in original copy.

there is any evidence to support the view that the jury may have exercised its pardon power. Practically every jury verdict of acquittal is susceptible to such an interpretation. A jury's verdict may possibly be based upon a defendant's demeanor or other matters not reflected by the record. For this reason courts should not speculate on whether the jury has reached its verdict through compassion or compromise. In determining whether collateral estoppel applies, a court should limit its inquiry to whether there was a factual basis, rather than an emotional basis, upon which the jury's verdict could have rested. Since we

have already found that there was no factual basis, other than Gragg's not having possessed a pistol, for the jury's not finding him guilty of aggravated assault and battery, we hold that collateral estoppel bars the state from relitigating this issue.

As for the question that was certified by the district court of appeal, we hold that a defendant is not estopped from asserting collateral estoppel as a defense to a charge after having sought and been granted a severance of the charge from other charges. The district court of appeal reached its holding that a defendant who successfully moves to

sever one count from the others is estopped from asserting collateral estoppel as a defense by extrapolating from the decision of Jeffers v. United States, 432 U.S. 137 (1977). In Jeffers the appellant was indicted, along with nine other persons, for conspiracy to distribute heroin and cocaine in violation of title 21, United States Code, section 846 (1970). A second indictment charged appellant alone with conducting a continuing criminal enterprise to violate the drug laws in violation of section 848 of the same statute. When the government moved to consolidate the two cases, Jeffers and his nine codefendants

objected. The trial court denied the government's motion and a trial was held under the first indictment. The jury found Jeffers and six of the codefendants guilty. Meanwhile Jeffers filed a motion to dismiss the second indictment on the ground of double jeopardy. He argued that the section 846 conspiracy charge was a lesser included offense of the section 848 continuing-criminal-enterprise charge. The trial court agreed with the government's contention that the two charges were separate offenses and denied the motion. Jeffers was found guilty at the second trial. The Court of Appeals affirmed.

On appeal, Justice Blackmun, writing for four members of the Court, found that conspiracy under section 846 was a lesser included offense of the section 848 crime. Justice Blackmun noted that under Brown v. Ohio, 432 U.S. 161 (1977), decided that same day, the Court had established the "general rule that the Double Jeopardy Clause prohibits a State or the Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser included offense." 432 U.S. at 150. Justice Blackmun then stated that "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no

violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." Id. at 152 (footnote omitted). With Justice White concurring on other grounds, the Court upheld the second conviction.

We do not find the Jeffers decision to be dispositive for two main reasons. First, as already noted, the statement that the Double Jeopardy Clause does not apply when a defendant elects to have two offenses tried separately was concurred in by only four members of the Court. Four other members dissented to such a holding, and the ninth, Justice

White, did not address the issue by deciding the case on other grounds. Thus the statement is merely dicta and is not an actual holding of the Court.

Secondly, Justice Blackmun's plurality opinion, in finding that Jeffers had moved for a severance.

> Petitioner argues that a finding of waiver is inconsistent with the decision in Simmons v. United States, 390 U.S. 377, 389-394 (1968), where the Court held that a defendant could not be required to surrender his Fifth Amendment privilege against compulsory self-incrimination in order to assert an arguably valid Fourth Amendment claim. In petitioner's case, however, the alleged Hobson's choice between asserting the Sixth Amendment fair trial right and asserting the Fifth Amendment double jeopardy claim is illusory. Had petitioner asked for a Rule 14 severance from the other defendants, the case might be different.

Id. at 153 n. 21.

In the case at hand, the district

court of appeal's decision would result in requiring Gragg to waive one constitutional right in order to assert another. Gragg moved to have the possession count severed so that evidence of his prior conviction could not be introduced so as to deprive him of his constitutional right to a fair trial. See State v. Vazquez, 419 So.2d 1088 (Fla. 1982). It would be unfair to encumber or restrict the exercise of this right by requiring him to waive his right against double jeopardy. Therefore, we hold that a defendant who successfully severs one charge from other charges is not estopped from asserting collateral estoppel as a bar to further prosecution under the

severed charge.

We therefore quash the district court of appeal's decision and remand this case with instructions that the trial judge's order of dismissal be reinstated.

It is so ordered.

ADKINS, OVERTON and EHRLICH, JJ., Concur
ALDERMAN, C.J. and McDONALD, J., Dissent

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Fourth District - Case No. 80-1898

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For Respondent

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

STATE OF FLORIDA,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

v.

CASE NO. 80-1898

VON DEE GRAGG,

Appellee.

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Opinion filed February 10, 1982

Appeal from the Circuit Court for Broward County; Russell E. Seay, Jr., Judge.

Jim Smith, Attorney General, Tallahassee, and Joy B. Shearer, Assistant Attorney General, West Palm Beach, for appellant.

Ronald P. Gossett of Hodges, Gossett, McDonald & Gossett, P.A., Hollywood, for appellee.

HERSEY, J.

The state appeals from an order dismissing one count of an Information filed against appellee. The basis for dismissal

was application of the doctrine of collateral estoppel. We reverse.

This, apparently, is a case of first impression and presents a very troublesome issue. In order to gain an insight into that issue we consider first the procedural framework and then the factual background which gave rise to this problem at the trial court level.

The appellee was charged by Information with aggravated battery by use of a firearm (in Count I), possession of a firearm by a convicted felon (in Count II), and aggravated assault by use of a firearm (in Count III). Prior to trial, appellee filed a motion to sever Count II on the grounds that proof of a prior

felony conviction, which was an essential element of the Count II offense, would be prejudicial to him in the trial of the other counts. The trial court granted this motion to sever.

The case went to trial on Counts I and III. Prior to reaching a verdict, the jury asked the following question: "[D]oes the defendant have to have a gun to be guilty of the information charge of aggravated assault, also aggravated battery." Because the Information charged aggravated battery and aggravated assault by use of a deadly weapon, a firearm, the trial court instructed the jury that it would have to find that appellee used such a deadly weapon. The

jury then returned a verdict of guilty of the lesser included offenses of battery and assault.

Appellee thereafter filed a motion to dismiss Count II of the Information on the basis that, by its verdict, the jury had determined that he did not possess a firearm on the evening in question, reasoning that under the principle of collateral estoppel, Count II should be dismissed. The trial court agreed and entered the order now on appeal.

The principle of collateral estoppel mandates that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same

parties in any future lawsuit. This rule of law is applicable in criminal cases as it is embodied in the Fifth Amendment guarantee against double jeopardy. Thus, when there is a previous general verdict, as is usually the case in criminal prosecutions, the court is required to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe v. Swenson, 397 U.S. 436, 444, 90 S.Ct.1189, 1194 (1970), quoting from Mayers & Yarbrough, Bis Vexari: New Trials and

and Successive Prosecutions, 74 Harv.L. Rev. 1, 38-39.

Appellee's position here is that the issue of whether he possessed a firearm (an ultimate fact) was determined in his favor by the jury verdict in the first trial. Specifically, he argues that the jury verdict finding him guilty of battery and assault rather than battery with a deadly weapon (firearm) and assault with a deadly weapon (firearm) was based upon a determination that he did not have a firearm in his possession. This is evidenced, appellee maintains, by the jury questioning whether he had to have a gun to be guilty as charged in the Information. According to appellee, then,

he cannot be tried for possession of a firearm because the issue of possession was previously determined in his favor and therefore the trial court's ruling is correct.

To test appellee's theory we review the evidentiary aspects of the "prior proceeding," in this instance, the jury trial on Counts I and III.

The events which resulted in charges being filed against appellee began with a domestic dispute between Joe Harrison and Mary Smith. Harrison testified he had been living with Mary Smith for about six months and on May 5, 1980 he had decided to move out of the house. Before leaving, he got into an argument with

Mary and a friend of hers, Debbie Woody. According to Mary and Debbie, Harrison hit Debbie, knocking her from a kitchen stool. As a result, Debbie Woody called appellee, who was a friend, and the police. The law enforcement officers arrived and remained at Mary Smith's residence until Joe Harrison left. Harrison then returned to the residence to pick up his truck after arranging to have a friend, Margaret Raines, accompany him.

Upon arriving home, Harrison realized that he did not have his key so he went to a neighbor's house to get the spare key. Harrison testified that while waiting at the neighbor's door, he heard someone call his name. He turned, and

saw appellee standing behind him with an arm raised in the air with a gun in his hand. According to Harrison, appellee was bringing his arm downwards to strike him. The neighbor testified that he had turned to go into the house and saw no one standing behind Harrison. At that point, according to Harrison, appellee jumped on him and pistol-whipped him. Harrison described the gun as a .32 or .38 chrome-plated revolver. He also testified that after beating him with the gun, appellee beat him with his fists. No one directly witnessed the fight or saw a gun. The treating physician stated that Harrison's injuries were consistent with being hit with a blunt object, a gun or

a ring.

Appellee admitted that he was involved in a fight with Harrison, but denied using or being in possession of a weapon, stating, however, that he was wearing rings on both of his hands. Appellee explained that a gun cleaning kit found in his car belonged to his wife and was probably left there from a time when he drove her to the shooting range. Mary Smith, who was with appellee when he went to Harrison's residence, testified that she did not see a weapon in appellee's possession at all throughout the evening.

The victim testified that immediately prior to being attacked by appellee he saw a gun in appellee's right hand.

Appellee then started hitting victim with the barrel of the gun. According to the victim, appellee jammed the barrel of the gun under his (victim's) chin. The victim testified that, from looking at the barrel, he could identify the gun as a revolver. He further described the firearm as chrome-plated with a short barrel. Thus, there was more than sufficient evidence from which the jury could have concluded that appellee was in possession of a gun, but there was also evidence to support appellee's contentions.

Failure of the jury to convict appellee of the gun-related offenses charged strongly suggests that they did not believe the testimony of certain witnesses.

In any event, the jury clearly was presented with the issue of whether appellee used a gun in perpetrating the assault and battery. It seems to us by necessary implication that the jury considered, and rejected, appellee's possession of a gun. This is so because a rational jury, on these facts, could not have separated the two issues.

Further, we do not ascribe to the state's view that the jury exercised its pardon power or acted out of compassion or through compromise, in the absence of a scintilla of evidence that the verdict resulted from one of those factors.

Without more, then, collateral estoppel would bar appellee's prosecution

on Count II. No question of jeopardy attaching has been or could be raised on these facts. See, e.g., State v. McCord, 402 So.2d 1147 (Fla. 1981).

There remains for our consideration the state's alternative position on appeal, to the effect that appellee is estopped from claiming application of the doctrine of collateral estoppel by his own actions. Put simply, appellee moved for severance of Count II in order to avoid prejudice at trial. He should not now escape prosecution on that count on the double jeopardy principle embodied in collateral estoppel. He, himself, should be estopped since jeopardy exists twice only because of his own actions.

We have been unable to find convincing authority on the precise issue involved here. However, in the closely related area of double jeopardy, the Supreme Court of the United States has applied estoppel under procedural facts similar to those with which we are confronted.

In Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207 (1977), the Supreme Court held that although a defendant is normally entitled to have charges on greater and lesser offenses resolved in one proceeding, Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221 (1977), there is no violation of the double jeopardy clause when he elects to have the two offenses tried separately and persuades the trial

court to honor his election. Applying Jeffers to the instant case, the state argues that since the offenses were properly joined but appellee moved and persuaded the trial court to sever them, there is no violation of the double jeopardy clause to invoke the principle of collateral estoppel.

The charges against defendant were in fact properly joined because they were based on the same transaction or connected acts or transactions. Fla.R.CrimP. 3.150(a). Thus appellee's actions brought about the present situation involving the question of collateral estoppel. By logical extension Jeffers is authority for our present holding that appellee cannot

now claim the benefit of collateral estoppel.

We are not unmindful of the argument that our holding may be said to penalize the appellee for the exercise of one constitutional right by denying another but, as in Jeffers, supra, we accept the logic but deny the equity of that argument here.

Accordingly, we reverse the order of the trial court dismissing Count II of the information and remand for further appropriate proceedings.

Because we proceed by logical extension of a principle gleaned from federal precedent, necessitated by the virtual vacuum in Florida law on the point involved, we certify the following question

to our supreme court as one of great public interest:

> When a defendant successfully seeks severance for trial of one of several counts against him, will he be estopped later to assert collateral estoppel as a bar to prosecution on that count where it otherwise would be available.

REVERSED, REMANDED and QUESTION CERTIFIED.

LETTS, C.J., and ANSTEAD, J., concur.